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Negotiating Violence and the Word in Rabbinic Law

Beth A. Berkowitz*

INTRODUCTION

When scholars write about rabbinic capital punishment, they tend to cite one well-known text from the Mishnah, a second-century C.E. Hebrew-language law code:

The Sanhedrin [Jewish court] that kills once in seven years is called destructive. Rabbi Elazar ben Azariah says: Once in seventy years. Rabbi Tarfon and Rabbi Akiva say: If we had been in the Sanhedrin, no one would have ever been killed. Rabban Shimon ben Gamliel says: Even they multiply murderers in Israel.¹

This text censures the rabbinic court that executes with anything nearing frequency, and two Rabbis, Tarfon and Akiva, claim that they would have never executed anyone at all. A dissenting comment from Rabban Shimon ben Gamliel argues that such abolitionism would have had disastrous social consequences by eliminating the deterrence that the death penalty allegedly provides. Many scholars of the last century, frequently omitting the last comment, concluded from this text and others that the ancient

* I would like to thank Steven Fraade for inviting me to participate in the *Nomos and Narrative* conference, Timothy Lytton for reading and commenting on multiple drafts of this paper, and Caroline Trowbridge for her careful editing.

1. MISHNAH, *Makkot* Chapter One, Mishnah Ten. The Mishnah was edited by Rabbi Judah the Patriarch in the land of Israel, at that time controlled by the Roman Empire. Tractate *Makkot* (Lashes/Flagellation) is the fifth tractate in the order *Nezikin* (Damages). Tractate *Makkot*, together with tractate *Sanhedrin* (a borrowed Greek work for court) with which *Makkot* was originally joined, deals with the rabbinic court system—different kinds of courts, their jurisdiction, and their leadership; procedures for both property cases and capital cases; and a list of crimes with their parameters and their punishments. MISHNAH, *Makkot* 1:10 comes somewhat out of context at the conclusion of the first chapter of the tractate, which lays out the laws of plotting witnesses, based on *Deuteronomy* 19:16-20.

For an introduction to classical rabbinic literature and the major scholarly works written on it, see HERMANN LEBERECHE STRACK & GÜNTER STEMBERGER, *INTRODUCTION TO THE TALMUD AND MIDRASH* (Markus Bockmuehl trans., 1996).

Rabbis were opposed to capital punishment.² The Rabbis would have completely abolished the death penalty, the argument goes, if they had not inherited it from the Bible. According to many proponents of this historical reconstruction, the Rabbis represent an advance in moral thinking over the relative barbarism of the Bible.

This paper first explores the contours and context of this scholarship and then offers a new approach that uses Robert Cover's work to rethink rabbinic law's relationship to violence. I draw on two of Cover's essays, *Nomos and Narrative* and *Violence and the Word*, to read another rabbinic legal text, Mishnah *Sanhedrin* Chapter Six, which describes the rabbinic procedure for criminal execution. I employ Cover's concepts of word, role, and deed, and specifically his claim that the judge's word is turned into violent deed through the mediation of roles. Using these concepts, I suggest that the Mishnah establishes a close relationship between the rabbinic judge and violence, but at the same time creates some distance between the two. According to Cover, such strategies are typical of law, which in order to maintain legitimacy must appear to be capable of violence yet not unduly eager to resort to it. I suggest that Cover's work, when applied to rabbinic law, helps to dispel the romanticism of rabbinic scholarship, even though paradoxically Cover's own discussion of Jewish law is subject to this very flaw. Finally, I recommend several new directions that Cover's work might give to scholarship on Jewish law, and I suggest that rabbinic texts, in turn, might complicate our reading of Cover.

SCHOLARSHIP ON RABBINIC CAPITAL PUNISHMENT

Many social forces helped to produce the scholarship that views the Rabbis as early opponents of capital punishment. The work of Samuel Mendelsohn is representative of many of the scholarly trends.³ Mendelsohn, a Lithuanian rabbi who immigrated to the United States and led congregations in the South, published his *Criminal Jurisprudence of the Ancient Hebrews* in Baltimore in 1891.⁴ In this work, Mendelsohn's

2. For other texts, see *infra* note 23. For a survey of scholarship on the ancient Jewish death penalty, see YAIR LORBERBAUM, *IMAGE OF GOD: HALAKHAH AND AGGADAH* 173 n.11 (2004) and BETH A. BERKOWITZ, *EXECUTION AND INVENTION: DEATH PENALTY DISCOURSE IN EARLY RABBINIC AND CHRISTIAN CULTURES* (forthcoming 2005).

3. According to Haut, the work was well-received at the time but then dropped out of sight until the 1960s. See Irwin H. Haut, *Introduction to SAMUEL MENDELSON, THE CRIMINAL JURISPRUDENCE OF THE JEWS* vi (Sepher-Hermon Press 1991) (1891).

4. On the life of Samuel Mendelsohn, see *id.* at v-ix. The term from his title and used here, "ancient Hebrews," is not a neutral choice. In the 1991 edition of Mendelsohn's book, this title phrase is changed to "Jews." The word "Jews" according to modern parlance is in fact the correct one for Mendelsohn's purposes: "Ancient Hebrews" suggests biblical Israel, while Mendelsohn is clearly referring to rabbinic Judaism. In using the term "Hebrew," Mendelsohn is using the preferred term of nineteenth-century American Jews, who understood "Jew" to be a less polite designation. See Naomi W. Cohen, *Antisemitism in the Gilded Age: The Jewish View*, in *ESSENTIAL PAPERS ON JEWISH-*

argument is that rabbinic criminal law is at once effective and humane: “[T]he system of criminal jurisprudence of the Ancient Hebrews, as recorded in the Talmud and in contemporaneous Rabbinic literature, was one which enforced civil order and secured the safety and peace of society by mildness and consideration, tempering justice with a love of humanity, and all this in an age of savagery and violence, of wars and uncertainty ...”⁵ In his introduction, Mendelsohn tells his readers explicitly the impetus for his work. Mendelsohn mournfully describes the Talmud, the culturally encyclopedic compendium of rabbinic literature roughly spanning the first half of the first millenium C.E., as “almost a sealed Book” and expresses his desire to open the Talmud to his American Jewish audiences.⁶ But he also expresses his concern to vindicate “the Israelitish people’s ancient literature from the aspersions cast upon it by inimical and, not unfrequently, ignorant writers.”⁷ Mendelsohn here seems to be addressing internal Jewish criticisms of the Talmud that emerged with the modern Jewish Enlightenment in Europe and continued in modified form in Reform Judaism.⁸ But Mendelsohn is also likely referring to Christian supercessionist criticisms of rabbinic Judaism that it represents a desiccated form of religion in comparison with its so-called successor, Christianity.⁹ In showing that the Talmud manifests a “love for humanity,” Mendelsohn is able to prove this age-old Christian criticism wrong.

Mendelsohn chooses criminal law as the test case for Judaism’s morality against a backdrop of changing public attitudes toward criminal punishment in the United States. Criticism of the death penalty in America can be traced back to the Founding Fathers, and in the 1830s and 1840s penal reform organizations were created.¹⁰ The Bible became the field on which the debates were fought, with each side using it as justification for their view.¹¹ In arguing for the humanitarianism of

CHRISTIAN RELATIONS IN THE UNITED STATES: IMAGERY AND REALITY 128 (Naomi W. Cohen ed., 1990) (discussing the resonances in late nineteenth-century America of the terms “Semite,” “Israelite,” “Hebrew,” and “Jew”).

5. MENDELSON, *supra* note 3, at 15.

6. *Id.* at 23.

7. *Id.* at 3.

8. See JAY HARRIS, HOW DO WE KNOW THIS? MIDRASH AND THE FRAGMENTATION OF MODERN JUDAISM 103-72 (1995) (discussing criticisms of classical rabbinic literature by *maskilim* [“enlightened” Jews] who rejected Judaism altogether and by reformers who worked to adapt Judaism to the changing social and ideological conditions of modernity).

9. See Louise A. Mayo, *The Ambivalent Image: Nineteenth-Century America’s Perception of the Jew*, in ESSENTIAL PAPERS ON JEWISH-CHRISTIAN RELATIONS IN THE UNITED STATES: IMAGERY AND REALITY 105-26 (Naomi W. Cohen ed., 1990) (discussing negative Christian perceptions of Jews and Judaism in the United States in Mendelsohn’s time).

10. LOUIS MASUR, RITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776-1865 (1989).

11. For example, see Masur’s description of the September 1881 debate between George Barrell Cheever and Wendell Phillips about the execution of Charles Guiteau, President Garfield’s assassin.

rabbinic criminal execution, Mendelsohn is showing that the Talmud agrees with the most progressive of contemporary mores according to his view. Moreover, Mendelsohn's work may have been influenced by the budding field of sociology, whose founder, Émile Durkheim, was at that time arguing that society's punishments are a window through which society's "true nature" can be viewed.¹² But Mendelsohn's choice of rabbinic criminal law also enables him to respond to the common Christian charge that the Jews were—and continued to be—responsible for the execution of Christ.¹³ Mendelsohn, in his work on the laws of rabbinic capital punishment, joins his fellow American Jews in a vigorous tradition of defending Judaism against its detractors.¹⁴ As the story of scholarship on the rabbinic death penalty progresses from the 1800s into the 1900s and 2000s, backlashes against some of these patterns also emerge, as well as new patterns responding to changing contexts and concerns—the establishment of the State of Israel and its opportunities for Jewish legal expression, and renewed efforts for Jewish-Christian dialogue.¹⁵ But Mendelsohn's motivations for examining the rabbinic death penalty persist: to defend the Talmud from Jewish and Christian attacks and to maintain the Talmud's relevance.

Id. at 161.

12. See ÉMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 109 (George Simpson trans., The Free Press, 1933) (1893) ("[T]here exists a social solidarity which comes from a certain number of states of conscience which are common to all the members of the same society. . . . In determining what fraction of the juridical system penal law represents, we, at the same time, measure the relative importance of this solidarity.").

13. Nathaniel Hawthorne's poem *The Star of Calvary*, is one of many representations of this view:

Behold O Israel! behold,
It is no Human One
That ye have dared to crucify
What evil hath he done?
It is your King, O Israel!
The God-begotten Son!

Nathaniel Hawthorne, *The Star of Calvary*, quoted in Mayo, *supra* note 9, at 107, 109. Naomi Cohen describes similar accusations of Jews as "Christ-killers" in the 1870's revivalist crusade of Reverend Dwight L. Moody. See Cohen, *supra* note 4, at 134. On the persistence of these views into the twentieth century, see Glock and Stark's sociological study in the 1960s that finds "widespread acceptance of the belief [among members of contemporary churches] that the Jews overwhelmed Pilate to bring about the death of Jesus. This is further confirmed by Table 21, which shows that 58 percent of the Protestants and 61 percent of the Roman Catholics picked the Jews as the group 'most responsible for crucifying Christ.'" CHARLES Y. GLOCK & RODNEY STARK, *CHRISTIAN BELIEFS AND ANTI-SEMITISM* 52 (1966). Mel Gibson's 2004 film, *The Passion*, and the controversy it stirred show the ongoing nature of the politically charged debate over the Jewish role in Jesus' execution.

14. See Sarna on the importance of polemical defense to American Jews. Jonathan D. Sarna, *The American Jewish Response to Nineteenth-Century Christian Missions*, in *ESSENTIAL PAPERS ON JEWISH-CHRISTIAN RELATIONS IN THE UNITED STATES: IMAGERY AND REALITY* 23 (Naomi W. Cohen ed., 1990).

15. See *supra* note 2.

MECHANISMS OF RABBINIC LEGAL VIOLENCE

Rabbi Tarfon and Rabbi Akiva's reluctance to impose the death penalty notwithstanding, the rabbinic legal canon does include an array of violent mechanisms of enforcement.¹⁶ Mishnah tractates *Sanhedrin* and *Makkot* outline detailed procedures for both capital and corporal punishment. These texts are strikingly innovative in their lawmaking.¹⁷ While the Bible refers primarily to one method of capital punishment, stoning (*Leviticus* 20:2, 27, 24:16; *Numbers* 15:35; *Deuteronomy* 13:11, 17:5; 21:21, 22:21), and legislates burning for two crimes (*Leviticus* 20:14, 21:9), the Rabbis describe four methods of capital punishment, adding decapitation and strangulation.¹⁸ In the realm of corporal punishment, the Rabbis delineate not only biblical lashes but a new type of lashes decreed by order of the Rabbis and imposed in a more severe way than biblical lashes.¹⁹ The Rabbis also institute imprisonment under certain conditions and create a death penalty tailored specially for priests.²⁰ Besides inventing new kinds of punishment, the Rabbis are also highly creative in their elaboration of penal procedures. For example, with stoning, instead of the collective casting of stones assumed by the Bible, the Rabbis require that the witness to the crime push the convicted criminal from an elevated platform.²¹ While it is the case that many of these punishments are difficult to implement according to the strictures of rabbinic law, the punishments nevertheless remain ready for use if proper procedure is

16. I speak here primarily of the tannaitic layer of rabbinic literature, dating roughly to the second century C.E. and emerging from Graeco-Roman Palestine.

17. Systematic research has yet to be done on the innovations of other Bible interpreters in late antiquity with respect to the Bible's punishments, with the important exception of Aharon Shemesh's recent work on Qumran's penal legislations. See AHARON SHEMESH, ONASHIM VE-HATA'IM MIN HA-MIQRA LE-SIFRUT HAZAL [PUNISHMENTS AND SINS FROM SCRIPTURE TO THE RABBI] (2003).

18. Mishnah, *Sanhedrin* 7:1. For analysis of the innovative character of the four rabbinic death penalties, see MOSHE HALBERTAL, MAHAPEKHOT PARSHANIYOT BE-HIT'HAVUTAN: ARAKHM KE-SHIQULIM PARSHANI'IM BE-MIDRESHEI HALAKHAH [INTERPRETIVE REVOLUTIONS IN THE MAKING: VALUES AS INTERPRETIVE CONSIDERATIONS IN MIDRASHEI HALAKHAH] 145-67 (1997); SHEMESH, *supra* note 17, at 11-34; and Haim H. Cohn, *The Penology of the Talmud*, 5 ISRAEL L. REV. 57-74 (1970).

19. MISHNAH, *Makkot* Chapter 3 legislates lashes with biblical authority. TOSEFTA, *Makkot* 4:17 describes rabbinic lashes (*makkot mardut*). Also see Sifre Zuta *Masei* 35:22, in SIFRE ZUTTA 333-34 (H. Saul Horowitz ed. and comp., Shalem 1992); Tosefta, *Nazir* 3:15, in THE TOSEFTA [ORDER NASHIM] 133 (Saul Lieberman, ed. and comp., The Jewish Theological Seminary of America 1995); PALESTINIAN TALMUD, *Nazir* 4:3 (53a-b). The legal foundation for rabbinic lashes and other punishments without biblical mandate is laid in Palestinian Talmud, *Hagigah* 2:2 (78a), with parallels in Babylonian Talmud, *Sanhedrin* 46a and *Yevamot* 90b. See HANINA BEN MENAHEM, JUDICIAL DEVIATION IN TALMUDIC LAW: GOVERNED BY MEN, NOT BY RULES 142-49 (1991) (discussing "extra-legal" penal innovations in rabbinic law); see also MENAHEM ELON, 2 JEWISH LAW: HISTORY, SOURCES, PRINCIPLES (HA-MISHPAT HA-IVRI) 515-19 (Bernard Auerbach & Melvin J. Sykes trans., 1994); Michelle Hammer-Kossoy, *Rabbinic Criminal Punishment: Divine Justice in Human Hands* (forthcoming 2005) (unpublished Ph.D. dissertation) (on file with author).

20. MISHNAH, *Sanhedrin* 9:5-6.

21. MISHNAH, *Sanhedrin* 6:4.

followed.²² Surveying these laws, we are drawn to conclude that legal violence occupied a great deal of rabbinic energy. Recently, in the wake of an explosion of scholarship on punishment sparked by Foucault's *Discipline and Punish*, rabbinic scholars have begun to give their attention to this penal system and to what it can tell us about rabbinic ideologies.²³

COVER ON LAW AND VIOLENCE

A parallel to the tendency in past rabbinic scholarship to underplay violence can be found in modern legal scholarship, which, according to Sarat and Kearns, had also largely avoided the theme of violence.²⁴ Robert Cover's work can be said to have almost single-handedly altered this trend, restoring to thinking about law the almost too-obvious connection between law and violence, argue Sarat and Kearns.²⁵ Cover discusses the relationship between law and violence in his essay, *Nomos and Narrative*, and more pointedly in his later essay, *Violence and the Word*.²⁶ The main thrust of *Nomos and Narrative* is not, however, the violence of law, but the law's meaning. Rather than emphasizing law's difference from other frameworks of meaning, he uses the broader term "nomos" to point to the similarities and connections. The state's law, like any other normative system, makes mythic claims for itself and demands commitment on the part of its adherents. To that extent, the state's law enjoys no more privilege than any other nomos competing with it. Yet Cover points out that there is something that makes the state's law different from, for example, the norms of the Mennonite Church: the state enforces its law with violence. To capture this distinction, Cover creates a dichotomy between two types of law, one which he calls paideic law and

22. The measures that hinder criminal conviction include a requirement that he or she be warned before the crime and reject that warning, the limitation of testimony to eye-witnesses, and other limitations on testimony. See Arnold Enker, *Yesodot Ba-Mishpat Ha-Pelili Ha-Ivri*, 24 MISHPATIM 178-82 (1994); Aaron Kirschenbaum, *The Role of Punishment in Jewish Criminal Law: A Chapter in Rabbinic Penological Thought*, 9 JEWISH L. ANN. 123-26 (1991); Devora Steinmetz, *Crimes and Punishments, Part I: Mitot Beit Din as a Reflection of Rabbinic Jurisprudence*, 55 J. OF JEWISH STUD. 82 n.4 (2004) [hereinafter Steinmetz, *Crimes and Punishments Part I*].

23. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., Vintage Books 1995) (1978). On rabbinic punishments, see BERKOWITZ, *supra* note 2; LORBERBAUM, *supra* note 2; HALBERTAL, *supra* note 18, at 145-67; SHEMESH, *supra* note 17; Steinmetz, *Crimes and Punishments, Part I*, *supra* note 22; and Devora Steinmetz, *Crimes and Punishments, Part II: Noachide Law, Brother-Sister Intercourse, and the Case of Murder*, 55 J. JEWISH STUD. 278 (2004).

24. Austin Sarat & Thomas R. Kearns, *Making Peace with Violence: Robert Cover on Law and Legal Theory*, in *LAW'S VIOLENCE* 215 (Austin Sarat & Thomas R. Kearns eds., 1992).

25. *Id.* at 215-16.

26. Robert M. Cover, *The Supreme Court, 1982 Term -- Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983), reprinted in *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* 95 (Martha Minow et al. eds., 1993) [hereinafter *ESSAYS OF ROBERT COVER*]; Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986), reprinted in *ESSAYS OF ROBERT COVER* 203.

the other which he calls imperialist.²⁷ In the paideic type, people are bound together by shared narratives, education, and vision. To the extent that this is so, violence is not necessary to enforce the law, since participation is based on a sense of common obligation. Cover contrasts this pattern to the “imperial,” marked by its need to enforce norms upon those who otherwise feel no mutual bonds. The paideic ideal-type, in short, he identifies with “law as meaning”; the imperial ideal-type is “law as power.”²⁸ Cover insists that in reality neither of these types exists in pure form; every *nomos* always consists of elements of both.²⁹ Nevertheless, Cover is emphatic about the radical split between these two modes: a *nomos* that is enforced with violence will always be experienced differently from a *nomos* that is not.

Yet Cover’s attention in *Nomos and Narrative* is largely taken up with “law as meaning” and much less with “law as power.” The balance of attention shifts in his essay, *Violence and the Word*, where his concern is precisely what makes a violently enforced system of law different from other networks of meaning. In this essay, Cover bucks an intellectual trend that honors the literary dimensions of law; indeed, we might include Cover’s own *Nomos and Narrative* within this trend.³⁰ In *Violence and the Word*, Cover reminds his audience of the obvious yet forgotten difference between law and literature: law takes place, quite literally, in a field of pain and death.³¹ Cover points to the fact of law’s violence in this essay, but he is also interested in how exactly law goes about accomplishing its violence. Cover describes significant cultural and moral inhibitions that law must overcome: people generally feel constrained when it comes to inflicting pain on others. Law’s solution, submits Cover, is to disperse responsibility. A social organization of violence is constructed such that the judge does not have to pull the switch, while the executioner does not have to bear the weight of the decision to execute. In this way, both the judge and the executioner are able to do their jobs in good conscience. Law thus manages to maintain a close connection to violence without getting too involved in the concrete pain and suffering caused by its sentences. But in the process, law binds itself to the organization that translates its word into deed. In other words, a judge must consider the appearance of legitimacy of her decision to those whom she expects to carry it out. In Cover’s language, legal interpretation

27. Cover, *Nomos and Narrative*, *supra* note 26, at 105-07.

28. *Id.* at 112.

29. *Id.* at 107.

30. Cover describes this scholarly trend, pointing to Ronald Dworkin and J. B. White as representative. See Cover, *Violence and the Word*, *supra* note 26, at 204 n.2. He differentiates *Nomos and Narrative* from the trend, admitting its emphasis on the “world-building” character of law, but restricting that essay’s scope to lawmaking among small groups.

31. *Id.* at 203.

becomes bonded: the judge is compelled to *justify* her decision.³² By the same token, violence gains sanction by its association with the judge's decision, even if those who carry out the violence must also obey that decision. In other words, law and violence each gain legitimacy but lose freedom in their encounter, an encounter that Cover portrays as mutually beneficial.³³ To summarize, the key themes in Cover's thinking on law and violence are: dispersal of responsibility for violence, law's need for legitimation, the bondedness of legal interpretation, and, finally, the domestication of violence, which is, according to Cover, part of law's very reason for being.

APPLYING COVER TO RABBINIC LAW

How might these themes be relevant to rabbinic law? Let me briefly address what Cover's own writings suggest. The very categories of *nomos* and *narrative* are borrowed from the world of the Rabbis, from the *halakhah* (law or *nomos*) and *aggadah* (narrative) interwoven within the Bible and within the Talmud.³⁴ But I want to consider how Cover *explicitly* depicted rabbinic law, when in the course of his reflection on law he would use the Rabbis as an example. A rabbinic text from the Mishnah structures the essay *Nomos and Narrative*; he derives his dichotomy between paideic law and imperialist law from it.³⁵ It seems then that for Cover rabbinic law encompasses both law as meaning and law as power. But when Cover writes of other religious systems in *Nomos and Narrative*, they all seem to fit the paideic type: the Mennonites, the Amish, the Shakers, the Quakers, the Mormons. And in some of Cover's other writings, that is also the case for rabbinic law. In *Violence and the Word*, the Rabbis appear as martyrs who *oppose* a coercive legal order.³⁶ In his essay, *Obligation: A Jewish Jurisprudence of the Social Order*, Cover acknowledges the coercive mechanisms of Jewish law, yet in the end differentiates Jewish law from other legal systems with centralized

32. *Id.* at 223-24.

33. *See id.* at 236 ("As long as death and pain are part of our political world, it is essential that they be at the center of the law. . . . The fact that we require many voices is not, then, an accident or peculiarity of our jurisdictional rules. It is intrinsic to whatever achievement is possible in the domesticating of violence.").

34. For one approach to the relationship between law and narrative within the Bible, see the works of Calum Carmichael, especially CALUM CARMICHAEL, *LAW AND NARRATIVE IN THE BIBLE: THE EVIDENCE OF THE DEUTERONOMIC LAWS AND THE DECALOGUE* (1985). *See also* Pamela Barmash, *The Narrative Quandary: Cases of Law in Literature*, 54 *VETUS TESTAMENTUM* 1 (2004). On the dialectical relationship between *halakhah* and *aggadah*, or law and narrative (loosely translated) within the Talmud, see the famous essay by the modern Hebrew poet Hayim Nahman Bialik, *Halakhah and Aggadah (Halakhah ve-Aggadah)*, and JEFFREY L. RUBENSTEIN, *TALMUDIC STORIES: NARRATIVE ART, COMPOSITION, AND CULTURE* (1999).

35. *MISHNAH, Avot* [Fathers] 1:2, 18; Cover, *Nomos and Narrative*, *supra* note 26, at 103-04.

36. Cover, *Violence and the Word*, *supra* note 26, at 206-07.

power and autonomous control.³⁷ In that essay's discussion, Jewish law is most certainly paideic, relying on bonds of mutual solidarity and obligation in contrast to rights-based western law. Cover's approach may be due to some of the same concerns discussed above with respect to scholarship on the rabbinic death penalty—to maintain the moral relevance of the rabbinic tradition and in so doing to counter Christian, Reform Jewish, and secular claims that classical Judaism should be either radically altered or discarded.³⁸ Despite Cover's own approach to Jewish law, his work can nevertheless do for the study of rabbinics what Sarat and Kearns argue he did for the study of law: reading rabbinic law through Cover's eyes suggests that violence plays a more active role than it has been accorded.

MISHNAH *SANHEDRIN* CHAPTER SIX: THE COURT HOUSE AND THE STONING HOUSE

Let me try to rewrite Cover on the Rabbis using Cover himself. That is, instead of looking at rabbinic law as paidea, I want to look at its imperialist or violent dimensions and apply Cover's themes, particularly that of law's need for legitimation. To reiterate, according to Cover, law must establish its proximity to violence in order for it to have the character of law, but it must also maintain some distance from that violence if it is to be effective and to appear legitimate. This balance is unusually delicate in the case of capital punishment, says Cover, since the deed that law authorizes in such a case is so extreme and irrevocable.³⁹ Let us see how proximity and distance are drafted into the procedure of criminal execution outlined by the Mishnah. Here is the first Mishnah of Tractate *Sanhedrin* Chapter Six (the full text of this chapter of Mishnah is found in an appendix):⁴⁰

When the judgment has been concluded, they take him out to stone him. The stoning house⁴¹ was⁴² outside the court house,⁴³ as it is

37. Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, in *ESSAYS OF ROBERT COVER* 242-43 (Martha Minow et al. eds., 1993).

38. On Robert Cover's personal Jewish commitments, see the forty-fifth volume of *Conservative Judaism* devoted to his memory, particularly Joseph Lukinsky & Robert Abramson, *Robert Cover: A Jewish Life*, 45 *CONSERVATIVE JUDAISM* 4 (1993).

39. Cover, *Violence and the Word*, *supra* note 26, at 230.

40. My translation is based on the standard printed edition; I will footnote significant variants emerging from the Kaufmann manuscript, considered to be the most important manuscript of the Mishnah. See *FAKSIMILE-AUSGABE DES MISCHNA CODEX KAUFMANN A50*, pt. 2, 297-98 (1929) (printed in Jerusalem with the approval of Hungarian Academy of Science in Budapest, under the supervision of Dr. Georg Beer).

41. Neither the Mishnah nor the Tosefta explains precisely what this structure is. They do discuss its height: the Mishnah describes the stoning house to be the height of two men, and the Tosefta comments that the height of the criminal should be added to this measurement rather than included within it. See *MISHNAH, Sanhedrin* 6:4; *TOSEFTA, Sanhedrin* 9:6; MOSHE S. ZUCKERMANDEL, *TOSEFTA: AL PI KITVE YAD ERFURT U-VIVENAH* 429 (1963). The preoccupation with height would

said, "Take out the blasphemer" [Lev. 24:14].⁴⁴ One [person]⁴⁵ stands at the entrance of the court, and the scarf⁴⁶ is in his hand, and one person⁴⁷ rides the horse far enough away from him so that he can still see him.⁴⁸ [If] one says, "I have [some point] to argue for his innocence," that person waves the scarf, and the horse runs and stops him. And even if he [himself] says, "I have [some point] to argue for my own innocence," they bring him back, even four or five times, only provided that there be substance in his words.⁴⁹

The text first establishes that the execution site (the "stoning house") must be distant from the court house, citing *Leviticus* 24:14, and it then stages a rescue effort on behalf of the convicted criminal. As he is processed from the court to the execution site, exonerating evidence is sought in a last-ditch attempt to reverse the verdict.

suggest that the "stoning house" was intended not as a full-scale building but as a structure or even platform of a certain height, with the word *beyt* (house of) in this phrase meant to be taken loosely (the word *bayit* is used in rabbinic literature for formal structures but also for various kinds of spaces, like those within the body—for example, *beit ha-beliyah*, the esophagus, literally, the "house of swallowing," *beit ha-shehi*, the armpit, literally, the "house of the bend"—and also to refer metaphorically to women).

42. The tenses shift back and forth between past and present within and among all versions of the Mishnah. It is difficult to know what meaning to make of this, whether the tense shifts are due to the vagaries of transmission or to a concerted effort on the part of the authors to chronologically locate this procedure in both the past and present, to attribute it to hoary tradition as well as to claim its contemporary relevance.

43. Like the stoning "house," the court "house" likely refers to some kind of provisional structure, though probably more solid and permanent than the stoning house. The seating layout of the court described in Mishnah *Sanhedrin* 4:3-4 does not mention an actual courthouse, but the elaborate nature of the seating suggests a housing structure.

44. The Kaufmann manuscript links this sentence with the previous one using the letter *vav*, though it appears to be added by a later scribe. The original scribe, in the same place, has added the article *et*, seemingly incorrectly, and the later scribe puts a line through the word.

Kaufmann and other early manuscripts (Parma and Paris) quote the verse in a more expanded form: "Take the blasphemer outside the camp." The abbreviation of later editions makes better sense of the Mishnah, which is not referring to the Israelite camp. I will presently suggest that the tension between the legislation and the biblical verse brought as its source is a fault line within the text that invites a closer reading.

45. I have added the words in brackets to make sense of the text, but the words themselves do not appear in the Mishnah text.

46. *Sudarim*. Borrowed from the Greek *soudarion*, though its ending gets confused by transmitters with a Hebrew plural and is then singularized to *sudar* in some versions and pluralized to *sudarim*. See ELIEZER BEN-YEHUDA, A COMPLETE DICTIONARY OF ANCIENT AND MODERN HEBREW (1960). Jastrow associates the word instead with the Hebrew root *sameh-dalet-resh*.

47. Kaufmann and the other early manuscripts eliminate explicit mention of a second person: "and the horse is far enough away . . ." A rider would seem to be implied, however.

48. The manuscripts and printings vary a great deal in their use of articles, e.g., the scarf/a scarf, the horse/a horse, etc. The definite article gives the procedure a more ritualized feel—the scarf and the horse set apart for this function—but one runs the risk of over-reading what may be merely scribal whim.

49. In the Kaufmann manuscript, the first mishnah ends here. In most later versions of the Mishnah, the individual mishnahs are not divided as in the early manuscripts: the Kaufmann and Parma manuscripts have twelve mishnahs, with the act of execution taking place squarely in the middle, in Mishnah Six. The Paris manuscript has eight mishnahs, while the Yemenite manuscript and printed editions have only six. Although the Kaufmann division has a stronger literary impact, I will use the standard divisions for convenience of reference.

The exegesis provided in this Mishnah is somewhat peculiar. In *Leviticus* 24:14, God delivers to Moses a command for the community to stone a blasphemer. God directs the people to perform their stoning “outside the camp”: “Take the blasphemer outside the camp; and let all who were within hearing lay their hands upon his head, and let the whole community stone him.”⁵⁰ While the verse quoted requires that the criminal be taken outside the *camp*, the Mishnah requires that the criminal be taken outside the *court*. Why does the Mishnah use the verse as a basis for its directive, when the verse’s execution site is different from that of the verse?⁵¹

Cover’s work allows us to make sense of the Mishnah’s hermeneutics. While *Leviticus* takes the execution outside the *camp* perhaps to avoid the future corpse spreading impurity, the Mishnah takes the execution outside the *court*, I would speculate, because its concern is to define the proper relationship between the court and its consequences, between legal word and violent deed. In its shift from “outside the camp” to “outside the court,” the Mishnah transforms the Bible’s procedure into a ritual of the court whose impact is to amplify and dramatize the connection between the rabbinic judge and the sentence he issues.⁵²

The Mishnah begins with the words *nigmar ha-din* (when the judgment has been concluded). The procedure begins with one foot in the court, with the decision of the court and the language of the court. The procedures then move towards the stoning house for the execution, upon which the bulk of the Mishnah is focused. But with the last two mishnahs of the chapter, Mishnahs Five and Six, the procedure returns to the court:

And they would not bury him in the graves of his fathers, but rather

50. *Leviticus* 24:14. I use the JPS translation. See JPS Hebrew-English Tanakh: the Traditional Hebrew Text and the New JPS Translation (1999).

51. The Babylonian Talmud (*Sanhedrin* 42b), noticing the difference between the law and the verse, asks: “And the stoning house was outside the court house? And not more?” Though the last sentence is absent in some Talmud manuscripts, it helps to explain the Talmud’s question: according to the Mishnah’s quoted verse, the place of stoning is not only outside the *court*, but outside the *whole camp*. The Talmud proposes an explanation for the Mishnah’s prescription: “And that which the Mishnah teaches, the following can be derived from it: if the court goes out and sits outside the three camps, then we should [still] make the stoning house outside the court in order that the court not appear to be murderers, or else, in order that there should be rescue.” *Id.* According to the Talmud’s resolution of the discrepancy, the Mishnah is giving two prescriptions: (1) that the site of execution be outside the Israelite camps, and (2) that the site of execution be outside the court. Thus, if the court for some reason is moved outside the camps, the court must still be distant from the site of execution. Through this resolution, the Babylonian Talmud shows the Mishnah both to be following the verse and to be injecting its own concerns for the court’s reputation and the criminal’s life.

Halivni points out problems in the Talmud’s interpretation. First, the discrepancy between the Mishnah’s law and the Mishnah’s verse still stands. Second, according to the Sifra, the court must be inside the camp. The Talmud’s interpretation, however, hypothesizes that the court might situate itself outside the camp. See David Weiss Halivni, *The Location of the Bet Din in the Early Tannaitic Period*, 29 *PROC. OF THE AM. ACAD. FOR JEWISH RES.* 181 (1960–61).

52. On looking at the Mishnah’s procedure of criminal execution as a ritual, see BERKOWITZ, *supra* note 2, ch. 3.

two gravesites⁵³ were prepared for the court, one for those executed by decapitation and strangulation, and one for those executed by stoning and burning.⁵⁴ When the flesh is consumed, they gather the bones and bury them in their place.⁵⁵ And the relatives come and ask after the welfare of the judges and the welfare of the witnesses,⁵⁶ that is to say,⁵⁷ that we have nothing in our hearts against you, that you judged a judgment of truth. And they would not mourn with full ceremonies, but they would mourn the day of the death, since mourning the day of the death⁵⁸ is only in the heart.⁵⁹

A separate burial is prescribed for the criminal, not in the gravesite of his fathers but in “gravesites (in the printed edition of the Talmud, literally “houses of graves”) prepared for the court.”⁶⁰ The criminal, now as a

53. *Batei qevarot*, though many versions have only *qevarot*. See SAMUEL KRAUSS, THE MISHNAH TREATISE SANHEDRIN 16 n.12 (1909); RAPHAEL NATHAN RABBINOVICZ, DIQDUQEI SOFRIM/VARIAE LECTIONES (1977) (on BABYLONIAN TALMUD, *Sanhedrin* 46a, n.90). The difference in terminology may reflect two different modes of burial found in rabbinic sources, the former referring to burial buildings, the latter referring to burial in the ground. See the explanation of terms in Joseph Patrich, *Qevurah Rishonah al-Pi Meqorot Hazal—le-Vi'uram Shel Munahim*, in QEVARIM VE-NOHAGEI QEVURAH BE-ERETS YISRA'EL BE-ET HA-ATIQA 191-93 (Itamar Singer ed., 1994).

54. The order is awkward, since the couplets of punishments are presented with the more lenient first, but within the couplets, the more severe punishment is first. The Kaufmann manuscript's order works better contextually, following the severe-to-lenient order of execution methods presented at the beginning of the next chapter of Mishnah: “one for those executed by stoning and by burning, and one for those executed by decapitation and by strangulation.” See KRAUSS, *supra* note 53, at 16 n.13; RABBINOVICZ, DIQDUQEI SOFRIM, *supra* note 53, at 46a, n.100.

55. *Bi-meqoman*. Also in the Paris manuscript and the Talmuds. See MISHNA CODEX PARIS 328-329 (1973). The Kaufmann manuscript and others have *ba-maqom*. One manuscript of the Babylonian Talmud has “in the graves of his fathers,” which I would argue is an alteration based on the Babylonian Talmud's interpretation. For further discussion of the location of a criminal's burial, see BERKOWITZ, *supra* note 2, ch. 4.

56. The order of witnesses and judges is reversed in Kaufmann and other early manuscripts, but presented this way by the Yemenite manuscript and the Mishnah in the Talmuds. The order would seem to determine whether more emphasis is placed on the judges who give the guilty verdict or the witnesses on whose testimony that verdict is based.

57. The Parma manuscript adds here *de'u*, (“that is to say, you should know that we have nothing”), Mishna Codex Parma 138 (1970). Some versions leave out *ke-lomar*, (“that is to say”), suggesting a direct quotation rather than an explanation of what the relatives say to the court.

58. *Aninut*. The word appears in Kaufmann and other early manuscripts as *aninah*. A dispute over the definition of *aninut* is reported in the Palestinian Talmud. According to Rabbi Judah the Patriarch, it refers to the period from death until burial, while according to the anonymous consensus, it refers to the day of the death. PALESTINIAN TALMUD, *Pesahim* 8:8 (36a-b); PALESTINIAN TALMUD, *Sanhedrin* 2:1 (20a). I translate *aninut* according to the anonymous consensus opinion. See DAVID KRAEMER, THE MEANINGS OF DEATH IN RABBINIC JUDAISM 28-29 (2000); NISSAN RUBIN, QETS HA-HAYIM: TIQSEI QEVURAH VE-EVEL BI-MEQOROT HAZAL, ANTROPOLOGIYAH SHE' HA-TALMUD 104-05 & n.3 (1997) (discussing *aninut*). On customs of full mourning, *avelut*, which this Mishnah contrasts with *aninut*, see KRAEMER, *supra*, at 31-32, and RUBIN, *supra*, at 160-89.

59. MISHNAH, *Sanhedrin* 6:5-6.

60. On Jewish burial customs in the rabbinic period, see KRAEMER, *supra* note 58, at 48-71; QEVARIM VE-NOHAGEI QEVURAH BE-ERETS YISRA'EL BE-ET HA-ATIQA (Itamar Singer ed., 1994); RUBIN, *supra* note 58; Gedaliah Alon, *Burial Customs in Early Israel*, 9 BULL. OF THE JEWISH PALESTINE EXPLORATION SOC. 107, 107-12 (1941). The Talmud explains that the reason for separate burial is that “one should not bury a wicked person next to a righteous one.” BABYLONIAN TALMUD, *Sanhedrin* 57a. The Talmud also addresses the reason for dividing the criminals themselves into separate burial plots, referring to the Mishnah's hierarchy of executions, running from stoning and burning for the most serious crimes to decapitation and strangulation for capital crimes considered less

corpse, makes his way back to the court, so to speak, which, in a final act of appropriation, refuses to hand the body over to the family.⁶¹ The procedure closes with the relatives making a reconciliation with the court. The execution thus begins and ends with the court house, after a long detour through the stoning house. Through this symmetry, the Mishnah emphasizes the link between the court and the execution. The rabbinic judge's word is shown to have a strong relationship to deed.

DISTANCING WORD FROM DEED

Yet according to Cover, the judge's word must also be clearly separate from deed. And indeed, the Mishnah does begin with the requirement that judge and execution be literally, spatially, distant from each other. The Mishnah chooses *Leviticus* as its source, I would suggest, because other legal traditions of the Bible, particularly those from *Deuteronomy*, threaten too great a proximity or even identity between court house and stoning house.⁶² Deuteronomic deaths tend to take place "within" rather than "without," such as in the case of the execution of an idolater in the following passage: "You shall take the man or the woman who did that wicked thing out to the public place [*el she'arekha*, literally: to your gates], and you shall stone them, man or woman, to death."⁶³ The verse

severe. According to the Talmud, following a similar logic as the one for separate burial, "[O]ne should not bury a severely wicked person next to a less wicked person." *Id.* Given that the Mishnah establishes four execution methods with four different degrees of severity, the anonymous talmudic editor asks: Why does the Mishnah not establish four different graveyards instead of two? The Talmud's response is that the establishment of two criminal graveyards is an inherited tradition. This talmudic commentary, it should be kept in mind, likely emerged centuries after the Mishnah and may or may not represent the Mishnah's own logic, which the Mishnah itself typically does not reveal.

61. Separate burials can also be found in conjunction with medieval European executions, after which the criminal was buried in grounds adjacent to the church: "Those who died in the hands of the law were excluded permanently." Esther Cohen, "*To Die a Criminal for the Public Good*": *The Execution Ritual in Late Medieval Paris*, *LAW, IN CUSTOM, AND THE SOCIAL FABRIC IN MEDIEVAL EUROPE: ESSAYS IN HONOR OF BRUCE LYON* 285, 294 (Bernard S. Bachrach & David Nicholas eds., 1990). After executions in early modern England and the Netherlands, the corpses of criminals were given to the anatomy room or exposed on the gallows. Burial with one's community was a major concern for criminals in Europe well into the eighteenth century according to Pieter Spierenburg. See PIETER SPIERENBURG, *THE SPECTACLE OF SUFFERING: EXECUTIONS AND THE EVOLUTION OF REPRESSION* 90 (1984).

62. The Palestinian Talmud addresses the conflict between the Mishnah and Deuteronomic execution; see *Sanhedrin* 6:1(23b). Also see the commentary attributed to the Ran, *matnitin*, and the Tosafot, *ki heykhi*, and HAYYIM BENVENISTE, *HAMRA VE-HAYYEI* 163-69 (1959), on Babylonian Talmud, *Sanhedrin* 42b.

The Mishnah's apparent neglect of *Deuteronomy* can also be explained hermeneutically: Halivni suggests that the Mishnah follows the readings of *Deuteronomy* found in the Targum and Midrash Tannaim that these verses are prescribing the site of judgment, not the site of execution. Thus when the Mishnah requires the execution to take place outside the court, it is in fact incorporating these Deuteronomic verses which equate the place of judgment with the city's gates. See David Weiss Halivni, *The Location of the Bet Din in the Early Tannaitic Period*, 29 *PROC. OF THE AM. ACAD. FOR JEWISH RES.* 181 (1960-61).

63. *Deuteronomy* 17:5. *Deuteronomy* 13:10-12, referring to the execution of the enticer to idolatry, does not specify any location, nor does *Deuteronomy* 17:12 for the man who acts presumptuously, or *Deuteronomy* 19:19 for the false witness.

directs the idolater to be taken to the public place, which in biblical times was located at the gates of the city.⁶⁴ *Deuteronomy* 21:19-21, commanding the execution of a rebellious son, likewise locates the execution at the public place. *Deuteronomy* 22:21, which directs the community to stone a betrothed woman who has had intercourse, locates the execution at the door of her father's house, since her sin challenges his authority and damages his reputation. These execution locations, the public square or the private house, are either identical to or not explicitly distant from the location of judgment, in marked contrast to the priestly author's "outside the camp." By choosing the priestly verse as its proof-text, the Mishnah is able to create distance between the two sites in its procedure, the court house and the stoning house, or, reading it through Cover's perspective, the judges and the violence they authorize.

The Mishnah goes on to emphasize this distance in various ways. First, it makes a long and labored procession from the court house to the stoning house. The beginning of the Mishnah—"they take him out to stone him"—is deceptive, because there is a continual possibility of a return to the court, with the stoning never taking place. The rescue team is ready, at a moment's notice, to bring the criminal back. Anyone may argue for the convicted man's acquittal,⁶⁵ and the Mishnah allows even the man himself to argue on his own behalf, "even four or five times" (by which the Mishnah means "even many times"). The Mishnah provides in the town crier yet one more opportunity for the criminal to be brought back to court: "And anyone who knows [an argument] for his innocence, let him come and argue for him." The language of the Mishnah also confirms the reluctance to move away from the court. Even when describing the execution once it has progressed outside the court, the Mishnah borrows language from inside the court, phrases it used in the previous chapter to legislate court procedure, such as: "I have [some point] to argue for his innocence," "they bring him back," "provided that there be substance in his words," "if they found him innocent, they exonerated him," "let him come and argue on his own behalf."

Not only does the procedure resist moving away from the court house, but it also is reluctant to move towards the stoning house. The second and third Mishnahs begin by marking the criminal's distance from the stoning house: "When he was about ten cubits' distance from the stoning house,

64. For a discussion of *Deuteronomy* 6:9, see JEFFREY H. TIGAY, *THE JPS TORAH COMMENTARY: DEUTERONOMY* 79 (1996).

65. Rashi and the Meiri, important medieval Talmud commentators, diverge in their interpretation of the Mishnah on this point: according to Rashi (Solomon ben Isaac, 1040-1105), the Mishnah permits any of the *judges* to argue on the convicted person's behalf, while according to the Meiri (Menahem ben Solomon, 1249-1316), the Mishnah permits anyone in the community to do so. See Benveniste's discussion of their positions, where he asks why the flag-waver does not just stand on high so that the horse-rider would not be necessary, BENVENISTE, HAMRA VE-HAYYEI, *supra* note 62, at 162-63 (*matnitin ve-ha-sus*).

they say to him, 'Confess' When he was four cubits' distance from the stoning house, they took off his clothes." It is not until Mishnah Four—"the stoning house was the height of two men"—that the criminal reaches the stoning house. The repetitive rhetoric of the preceding mishnahs contributes to a ritualized slowdown, creating a series of delays, heightening the suspense, now along literary lines, using its character as text to reinforce the drama. Cover's work would suggest that by emphasizing the long distance between the court and the stoning house, the Rabbis show themselves to be reluctant authorities who are not intimately or eagerly involved in the implementation of their decisions. As Cover points out, "[O]ur judges do not *ever* kill the defendants themselves. They do not witness the execution. . . . The most elementary understanding of our social practice of violence ensures that a judge know that she herself cannot actually pull the switch."⁶⁶ In the Mishnah's terms, "the stoning house is outside the court house." Paradoxically, the constant stops and starts might also have the opposite effect, emphasizing the ever-present link between the court house and the stoning house. Indeed, this mixed message—word and deed are distant, word and deed are closely linked—is precisely what Cover suggests is the key to law's efficacy.

The shift from a horizontal to a vertical axis of movement for the act of execution itself also has a distancing effect, in that it may imply that God, not the rabbinic judges, is responsible. Mishnahs One, Two, and Three, which detail the departure from the court and the approach to the stoning house, take place along a horizontal axis: the convicted man, the horse-rider, and the herald all move between point A, the court house, and point B, the stoning house. But Mishnah Four, describing the act of execution, shifts abruptly to a vertical axis—the primary movements are pushing from a high platform and dropping a heavy stone:

One of the witnesses pushes him on his hips (from the platform); [if] he turns over onto his heart, he flips him over onto his hips. And if he dies thereby, he has fulfilled his obligation. But if not, the second [witness] takes the stone and sets it on his heart. If he dies thereby,

66. Cover, *Violence and the Word*, *supra* note 26, at 229, 234. Spierenburg writes similarly of late medieval/early modern European executions: "The highest authority did not associate itself directly with violent death on the scaffold." SPIERENBURG, *supra* note 61, at 54. The distance of the judges from the execution is found in a description of a ceremony of execution in Amsterdam, in a manuscript circa 1660 by Hans Bontemantel treating Amsterdam's government. According to his description, "the magistrates come into the justice-room once again and kneel in prayer, together with the prisoners and the preacher. After this they return to the windows and watch the sentences being executed." *Id.* at 46-47. Conforming to Cover's theory, the judges of Amsterdam are distanced as well as linked to the execution—they remain near the execution, watching it, but from a window. An execution similar to the one described by Bontemantel is found pictorially in a woodcut printed in Paris in 1541. See Mitchell Merback's reproduction and description: "The judges and magistrates, their work now done, have withdrawn from the scene and taken up positions in first-floor windows." MITCHELL B. MERBACK, *THE THIEF, THE CROSS, AND THE WHEEL: PAIN AND THE SPECTACLE OF PUNISHMENT IN MEDIEVAL AND RENAISSANCE EUROPE* 142 (1998).

he has fulfilled his obligation.⁶⁷

There are many speculations regarding the basis for this strange execution procedure.⁶⁸ I want to focus for the moment on the type of action it prescribes: both movements are “passive aggressive.” It is not the act itself that causes the death—the push—but rather the effects of the act—the fall. Moreover, the potential failure of the act to kill the convicted criminal (if he dies thereby . . . but if not . . .) suggests that the act is not entirely lethal; the execution procedure thus implies, in yet another way, that the executioner is not fully responsible for the criminal’s death, as I will discuss further below. After the death act, the procedure continues along its vertical axis with the hanging of the body:

How do they hang him? They sink the beam into the ground, and the wood comes out from it; they place his hands one on top of the other, and they hang him. Rabbi Yose says: The beam is inclined against the wall, and they hang him on it the way that the butchers do. And they loosen him immediately . . .

The Mishnah here presents a sequence of up-and-down motions surrounding the criminal’s death: the body is taken up for stoning; the body falls; the stone falls; the body is taken up for hanging; the body is taken down. David Kertzer characterizes certain judicial rituals in small-scale societies as “taking the highly charged power of determining guilt in interpersonal disputes away from individuals and assigning it to some extra-human agency.”⁶⁹ By shifting from a horizontal to a vertical axis,

67. The Paris manuscript of the Mishnah has the first witness both pushing the criminal and also dropping the stone. If the criminal still has not died, only then does the second witness come and repeat the stone drop: “One of the witnesses pushes him on his hips; if he turns over onto his heart, he flips him over onto his hips. If he dies, he has fulfilled his obligation. But if not, he takes the stone and sets it on his heart. If he dies thereby, he has fulfilled his obligation. But if not, the second witness takes the stone and sets it on his heart. If he dies thereby, he has fulfilled his obligation. But if not, his stoning is by all of Israel. . . .” This version is found also in the Naples printing, the Palestinian Talmud’s Mishnah, and in some traditions of the Babylonian Talmud. See RABBINOVICZ, *supra* note 53 (on *Sanhedrin* 45a, n.9).

68. The Mishnah subsequently quotes *Deuteronomy* 17:7 as the source for the procedure, or at least, for the primacy of the witnesses in it: “Let the hands of the witnesses be the first against him to put him to death, and the hands of the people thereafter.” Also see the parallel in *Sifre Numbers* 114 in *SIPHRE D’BE RAB* 123 (H. Saul Horovitz ed., Shalem 1992) (1917). The procedure is also hermeneutically linked in rabbinic literature to *Exodus* 19:12-13, where God prohibits the Israelites from ascending or even touching Mount Sinai before revelation, directing the Israelites to stone or shoot (with a slingshot) anyone who does. See *Mekhilta de-Rabbi Yishma’el Maskheta de-Ba-Hodesh*, in 3 *MECHILTA D’RABBI ISHMAEL* 212-13 (H. Saul Horovitz & Israel A. Rabin eds., 1960); *Mekhilta d’Rabbi Simon b. Jochai* 141 (*Mekhilta de-Rashbi* et al. eds., 1955); and *BABYLONIAN TALMUD*, *Sanhedrin* 45a-b. In the Babylonian Talmud the procedure is also linked to *Leviticus* 19:18: “[L]ove your neighbor as yourself.” *Sanhedrin* 45a.

Cohn argues that the driving force of this procedure is a rabbinic desire to eliminate all traces of vindicta publica. See Cohn, *supra* note 18, at 65. Halbertal has more recently argued that the intention of the Rabbis in this procedure is to preserve the form of the human body, which the Rabbis construed quite literally to be fashioned in the image of God. See HALBERTAL, *supra* note 18, at 145-67.

69. DAVID I. KERTZER, *RITUAL, POLITICS, AND POWER* 133 (1988).

the Sages may be symbolically implying that divine agency, not their own, lies behind the act of execution.⁷⁰ As Meiselman concludes from his study of the rabbinic death penalty, “the human court becomes the agent for God’s punishment.”⁷¹ Displacing the human judge with the divine perhaps marks the ultimate separation between a judge and the violence he legislates.

THE ACCIDENTAL EXECUTION

I have just explored how the geography of the Mishnah’s procedure distances the judge’s word from the deed it produces. Indeed, I have suggested that all agency is obscured in rabbinic execution, by the judge or anyone else, and I would refer to Cover’s claim that responsibility for law’s violence is habitually dispersed. This becomes particularly clear in the case of rabbinic execution if we examine this chapter of Mishnah in its larger literary context in tractate *Sanhedrin*. If we juxtapose the execution procedure in Mishnah *Sanhedrin* Chapter Six with the legal definition of intentional homicide in Mishnah *Sanhedrin* Chapter Nine, we find that the Mishnah sharply differentiates execution from intentional killing.

Mishnah *Sanhedrin* 9:1 makes a distinction between different types of homicidal actions: “A homicide who strikes his neighbor with a stone or an iron tool, or holds him down in the water or in the fire, and he cannot get up from there and he dies—he (the homicide) is guilty [of intentional homicide]. He pushes him in the water or in the fire, and he can get up from there and he dies—he (the homicide) is exempt [from punishment for intentional homicide].” This Mishnah identifies the intentional homicide as one who actively strikes someone with a heavy weapon such as a stone or iron, or alternatively someone who holds another person down in water or fire. The text contrasts this with the unintentional homicide, who merely pushes another into water or fire. In Mishnah Chapter Six, the witness-executioners seem to fall into the latter camp: they push the criminal (from a height rather than into water or fire) instead of striking him or holding him down. In fact, the same verb is used for unintentional homicide in Chapter Nine that is used for the death act of the witnesses in Chapter Six: *dahaf* (push). This confirms our sense that the executioners

70. Besides Cover, others have noted the tendency of executions to disperse or veil responsibility. Smith quotes one Missouri official stating that the advantage of Missouri’s lethal injection machine lies in its ability to “spread out the responsibility.” Brian K. Smith, *Capital Punishment and Human Sacrifice*, 68 J. AM. ACAD. RELIGION 3, 10 n.6 (2000). Foucault talks about the dispersal of responsibility in modern European punishment: “Small-scale legal systems and parallel judges have multiplied around the principal judgment: psychiatric or psychological experts, magistrates concerned with the implementation of sentences, educationalists, members of the prison service, all fragment the legal power to punish.” FOUCAULT, *supra* note 23, at 21.

71. Moshe Meiselman, *Capital Punishment in Jewish Law*, 8 GESHER 23, 26 (1981). And later: “The picture we have provided so far is that of divine justice handed over, at times, to human courts.” *Id.* at 29.

of Chapter Six are not intentional agents of homicide.

Mishnah *Sanhedrin* 9:1 distinguishes not only between types of actions but also between the effects of those actions. If the victim cannot rise, then the homicide is guilty of intentional murder, whereas if the victim can rise, even if he ultimately dies, the homicide is guilty only for unintentional homicide. Here, too, the witness-executioners of Mishnah *Sanhedrin* Chapter Six seem to fit into the second category. Chapter Six suggests, with each act of execution except the final one by the community, that the criminal could theoretically survive the execution: "If he dies . . . if not" Thus, the execution of Chapter Six should be classified, according to Chapter Nine, as unintentional or accidental homicide—in other words, *not* murder.

Mishnah *Sanhedrin* 9:2 deals more explicitly with the homicide's intention:

He intended to strike him on his hips and there was not enough [force] in it to kill him on his hips, [except the strike] goes onto his heart and there is enough [force] to kill him on his heart, and he dies—he is exempt.

He intended to strike him on his heart and there is enough [force] to kill him on his heart, [except the strike] goes onto his hips and there is not enough [force] to kill him on his hips, and he dies—he is exempt.

But he intended to strike on his hips and there is enough [force] to kill on his hips, [except the strike] goes onto his heart, and he dies—he is guilty.

This Mishnah outlines three possibilities of homicide. In the first case, the homicide does not intend to kill his victim but accidentally does so. This type of homicide is given exemption from punishment. In the second case mentioned by this mishnah, the homicide does indeed mean to kill, but he makes a mistake, striking his victim on a less vulnerable part of the body than he had intended. If the one who is struck dies anyway, the homicide is exempt because his strike must not have been the direct cause of death. While in this second case the homicide does have homicidal intention, he cannot be held accountable because his attack cannot be directly linked to his victim's death. We can deduce from these two cases that the Mishnah requires the fulfillment of two conditions for culpability: intention and clear causation.⁷² The Mishnah's last case provides both, even though the homicide makes a mistake in this case as well. This mistake is different,

72. For analysis of the early rabbinic laws of homicide, see Jonah Ostrow, *Tannaitic and Roman Procedure in Homicide*, 48 JEWISH Q. REV. N.S. 352 (1957-58) & 52 JEWISH Q. REV. N.S. 160, 245 (1961-62), reprinted in 4 STUD. JEWISH JURISPRUDENCE 211 (1976). For analysis of the laws of homicide in the biblical period, see PAMELA BARMASH, *HOMICIDE IN THE BIBLICAL WORLD* (2004).

however, because the homicide's act can still be shown to be the direct cause of death.

Chapter Nine provides a revealing backdrop to Chapter Six. Like Chapter Nine, Chapter Six focuses attention on the hearts and hips of the person killed, repeating the phrases *al libo* (on his heart) and *al motnav* (on his hips). Chapter Nine's presumption that the heart is the more vulnerable location tells us that in Chapter Six, when the first executioner targets not the heart but the hips, he does not strictly "intend" to kill him. And though the killer of Chapter Nine's last case does kill his victim by striking him on the hips, the first executioner of Chapter Six merely pushes him on the hips (albeit on an elevated platform). Moreover, the killer of Chapter Nine's second case intends to strike (*le-hakoto*) his victim on the heart, while the second executioner of Chapter Six merely drops (*notnah*) onto the heart. The Mishnah of Chapter Six seems to ape Chapter Nine, proving that execution is indeed homicide, but the "good" kind, that is, unintentional or accidental. Through these parallels, the Mishnah differentiates between execution and murder by associating execution with accidental death.⁷³

AN ARGUMENT FOR AUTHORITY

I have been emphasizing the spatial and conceptual distance that the Mishnah puts between the court house and the stoning house. But it is important to remember the Mishnah's simultaneous emphasis on their proximity. Cover writes: "Judges are both separated from, and inextricably linked to, the acts they authorize."⁷⁴ In other words, the judge is not a legitimate judge if her words are not separate from the power of deed, but the judge is only a legitimate judge if her words have the power of deed. Though the execution cannot take place only with a judge, neither can the execution take place without a judge. In the Mishnah's terms, if the court house is not linked to the stoning house, it is not a court house but simply a house of scholars or thinkers. If the court house is also a stoning house, then the judges themselves turn into criminals.

73. On state efforts to differentiate execution from murder, see AUSTIN SARAT, *WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION* 65 (2001) ("[T]he legal construction of state killing, while it appears to reveal empathy or identification between the state and those it kills, works primarily to differentiate state killing from murder."). Also see Smith's discussion of the ritualization of capital punishment: "Indeed, ritualized death is made to appear as unlike killing in the extra-ritual world as possible." Smith, *supra* note 70, at 11. Smith describes, for instance, the medicalizing of execution so that pain and torture are eliminated. These efforts inevitably can fail—for example, the criminal is not killed immediately or the executioner is himself endangered by the execution method. On technical difficulties in American executions, see Errol Morris's documentary film *MR. DEATH: THE RISE AND FALL OF FRED A. LEUCHTER, JR.* (Lions Gate Films 1999) (designer of execution equipment is eventually co-opted by the Holocaust denial movement). On botched executions, see FOUCAULT, *supra* note 23, at 51-53. These mistakes can obviously become the basis for criticism of the death penalty and, by extension, the authority who administers it.

74. Cover, *Violence and the Word*, *supra* note 26, at 235.

The Mishnah's geography creates this double-sided argument for authority. The basis of that authority's legitimacy is, on one side, its distance from the stoning house, the slowing down of execution, the vertical axis of action, the differentiation of execution from intentional homicide. All these features point to an authority that is self-restrained, reluctant to exercise violence. But the basis of rabbinic authority's legitimacy is at the same time its *capacity* to exercise violence. By linking the court house to the stoning house yet not identifying them, the Mishnah gives to the word of the rabbinic judges its "homicidal potential," to use Cover's expression.⁷⁵ The Mishnah argues for the authority of rabbinic Law through these laws of execution, through the play of proximity and distance between the court house and stoning house. If this Cover-influenced approach to the Mishnah, emphasizing rabbinic law's pursuit of legitimacy through its careful structuring of capital punishment, may be just one reading, at the very least it is strikingly similar to the reading given by the Babylonian Talmud, which explains the distance between the site of judgment and the site of execution as emerging out of the concern not to have the rabbinic court "look like murderers."⁷⁶ The Talmud's unspoken assumption is that the rabbinic court has the ability to kill if it wants to.

THE POWER TO PUNISH

The Talmud's assumption, however, is surprising, given that in the Talmud the claim is made that the power of criminal punishment was withdrawn from the Jews forty years prior or at the time of the destruction of the Second Temple, before the rabbinic period had even begun.⁷⁷ Based on the talmudic evidence as well as historiography of Roman Palestine in

75. *Id.* at 214.

76. BABYLONIAN TALMUD, *Sanhedrin* 42b. See also *supra* note 51.

77. On the Talmud's claim that criminal jurisdiction was revoked, see BABYLONIAN TALMUD, *Sanhedrin* 41a/*Shabbat* 15a/*Avodah Zarah* 8b/*Rosh Hashanah* 31a; BABYLONIAN TALMUD, *Sanhedrin* 52b; BABYLONIAN TALMUD, *Ketubbot* 30b/*Sotah* 8b/*Sanhedrin* 37b; PALESTINIAN TALMUD, *Sanhedrin* 1:1 (18a), 7:2 (24b). The Jewish court's criminal competence in late antiquity has been extensively discussed (largely because of its relevance to the execution of Jesus). See 1 RAYMOND BROWN, *THE DEATH OF THE MESSIAH: FROM GETHSEMANE TO THE GRAVE: A COMMENTARY ON THE PASSION NARRATIVES IN THE FOUR GOSPELS* 363-72 (1994); LORBERBAUM, *supra* note 2, at 98 n.11; JAMES S. MACLAREN, *POWER AND POLITICS IN PALESTINE: THE JEWS AND THE GOVERNING OF THEIR LAND*, 100 B.C.-A.D. 70, 88-101 (1991); HUGO MANTEL, *STUDIES IN THE HISTORY OF THE SANHEDRIN* 254-302 (1961); ALFREDO MORDECHAI RABELLO, *HA-YEHUDIM BA-IMPERIAH HAROMIT BE-RE' HA-HAQIQAH [BE-IQVOT MEHQARO SHEL JEAN JUSTER]* 82 & n.28 (1987); Ephraim E. Urbach, *Batei-Din Shel Eshrim u-Sheloshah Ve-Dinei Mitot Beit-Din*, in *FIFTH WORLD CONGRESS OF JEWISH STUDIES* 40 n.13 (P. Peli ed., 1972); Gedaliah Alon, *Towards an Investigation of the Halakhah of Philo [Criminal Law Before the Sanhedrin in Jerusalem]*, 5 *TARBIZ* 28 (1924) & 6 *TARBIZ* 241 (1925) (Hebrew); Gerald Blidstein, *Capital Punishment—the Classic Jewish Discussion*, 14 *JUDAISM* 159, 170-71 n.23 (1965); Isaac Rabinowitz, *The Meaning and Date of Damascus Document IX, I*, 6 *REVUE DE QUMRAN* 433-36 (1968); Paul Winter, *Sadoqite Fragments IX, I*, 6 *REVUE DE QUMRAN* 131-36 (1967); Paul Winter, *The Trial of Jesus and the Competence of the Sanhedrin*, 10 *NEW TESTAMENT STUD.* 494-99 (1964).

this period, it remains a matter of more than some doubt whether the Mishnah's procedure for capital punishment was ever implemented, indeed, whether much of the Mishnah's entire set of legislations was ever implemented in its own time.⁷⁸ If the legislators who authored the Mishnah assumed a set of political conditions in which they were unable to carry out the death penalty, surely that would alter our reading of the role that violence plays. Indeed, according to Cover, a legal system without the competence to exercise violence encounters a "crisis of credibility"; the law comes to represent an ideal whose function is far removed from the regulation of people's everyday lives.⁷⁹ Cover suggests that "such a dichotomy has immense implications *if built into the law*."⁸⁰

But we should observe that the Mishnah does not, in fact, build such a dichotomy into its law, at least in theory. If we read the Mishnah without reference to subsequent talmudic commentary or to historiography of second-century Roman Palestine, we find little hint of obstacles to implementation.⁸¹ The Mishnah does not ask its audience to see its death penalty in a context of disempowerment; it represents itself, quite shockingly given our knowledge of the period, as a perfectly legitimate and practiceable law code. One of the few allusions to a problem of practice is in fact in the text I cited in my opening, when Rabbis Tarfon and Akiva speak in the subjunctive: "if we *had been* in the Sanhedrin." Otherwise, one must wait for the talmudic commentary to learn of the Roman abrogation of Jewish criminal law. In the Mishnah's vision of law, it seems, legal interpretation does "take place in a field of pain and death."

78. The current scholarly consensus views the Rabbis of second-century Jewish society in Palestine as a small, informally organized group struggling for authority in a political structure in which their exercise of power depended on persuasion. See MARTIN GOODMAN, *STATE AND SOCIETY IN ROMAN GALILEE, A.D. 132-212* (1983); CATHERINE HEZSER, *THE SOCIAL STRUCTURE OF THE RABBINIC MOVEMENT IN ROMAN PALESTINE* (1997); LEE LEVINE, *THE RABBINIC CLASS OF ROMAN PALESTINE IN LATE ANTIQUITY* (1989); SETH SCHWARTZ, *IMPERIALISM AND JEWISH SOCIETY: 200 B.C.E. TO 640 C.E.* (2001); Shaye Cohen, *The Rabbis in Second-Century Jewish Society*, in 3 *THE CAMBRIDGE HISTORY OF JUDAISM 922-90* (William Horbury et al. eds., 1999). This recent historiography forsakes the tendency to retroject later rabbinic institutionalization onto the early period.

79. Cover, *Violence and the Word*, *supra* note 26, at 222.

80. *Id.* at 223.

81. Historians of criminal jurisdiction in the Roman provinces emphasize the power of the Roman governor and the Roman Emperor. See Peter Garnsey, *The Criminal Jurisdiction of Governors*, 58 *J. ROMAN STUD.* 51, 51-55 (1966); Peter Garnsey, *Why Penal Laws Become Harsher: The Roman Case*, *NAT. L. FORUM* 141 (1968); Ramsay MacMullen, *Judicial Savagery in the Roman Empire*, 16 *CHIRON* 147-66 (1986). Nevertheless, the Jewish communities of Palestine likely had a limited degree of judicial autonomy. For reconstructions that suggest that Jews had some criminal jurisdiction, see Alfredo M. Rabello, *Jewish and Roman Jurisdiction*, in *AN INTRODUCTION TO THE HISTORY AND SOURCES OF JEWISH LAW* 144 (N.S. Hecht et al. eds., 1996); Peretz Segal, *Jewish Law During the Tannaitic Period*, *AN INTRODUCTION TO THE HISTORY AND SOURCES OF JEWISH LAW* 103-04 (N.S. Hecht et al. eds., 1996). If the Jews of second-century Palestine did have some limited, negotiated degree of local judicial autonomy, it still does not tell us anything about the small group of Rabbis in whom we are interested, who likely had even more limited powers, certainly regarding criminal jurisdiction.

A rabbinic judge's word does theoretically have the power to kill. The Mishnah's procedure of execution, whether or not it ever truly translated into deed, is about the palpable and potent relationship between rabbinic word and violent deed.

Nevertheless, Cover himself might have argued that if the Mishnah was never translated into deed then it should not be considered law, but literature. What distinguishes law from literature, Cover insists in *Violence and the Word*, is that it contains a real and enforceable threat of violence. Without that, the text can at best be compared to a very compelling novel. But in this hypothetical dialogue with Cover I would caution that we not underestimate the vividness the Mishnah may have had within the probably small circles in which it was authored and transmitted, even while keeping in mind the difference between actual executions and literary ones.⁸² Perhaps the peculiar character of the Mishnah as a law code that could barely be practiced in its own time provides us with an opportunity to challenge Cover's opposition between law and literature. The Mishnah seems to partake of both genres, or neither: it looks more like a law code but it acted more like literature. The Mishnah invites us to try to synthesize Cover in *Nomos and Narrative* with Cover in *Violence and the Word*, to find the ways that literature may have its own consequential discourse of violence not so different from or unrelated to that of law.

NOMOS AND NARRATIVE: NEW DIRECTIONS

Cover himself may overlook or suppress the violence of rabbinic law. This aversion may be part of a larger problem in Cover's work on violence, which, according to Sarat and Kearns's critique, functions partly as an apology for law's violence.⁸³ But his writings do invite us to scrutinize more carefully if not even more critically than Cover himself the violence that attends Jewish law. The rethinking of the relationship between rabbinic law and violence can happen along several lines: first, the question must be asked again, in light of recent historiographical advances of the historical reality of rabbinic coercion, from the earliest rabbinic period, the second-century tannaitic period discussed here, through the subsequent amoraic period of the third, fourth, and fifth centuries, and into the period of the talmudic redactors afterwards, in both the major rabbinic communities of Palestine (now Israel) and Babylonia (now Iraq). Any consideration of rabbinic law's relationship to violence must be grounded in the most recent, plausible, and sophisticated

82. See *supra* note 78 on the argument that the second-century Rabbis were a small, informally organized subculture within Jewish Palestine.

83. See Sarat & Kearns, *supra* note 24.

historical reconstructions of that law's coercive potential. With an adequate reconstruction of the socio-political conditions, we can begin to cross-read, to try to better understand the dialectical relationship between rabbinic law and ancient Jewish society.

The second and related front for rethinking rabbinic legal violence is the rabbinic legal texts themselves. We should look at the *discourse* of rabbinic violence, the mechanisms for social control that the Rabbis interpret or invent to accompany their law. This would include corporal, capital, and monetary punishments, both those meant to be imposed by the rabbinic courts and those the Rabbis claim to be imposed by God. Following Cover's model, we should consider this discourse to include both laws and narratives of coercion. Cover's work would have us ask about this discourse: how does rabbinic law position itself vis à vis its own potential for violence? Cover's configurations of law and violence can help us to explore the multiplicity of ways in which rabbinic law incorporates and advocates violence but also, alternately, strategically repudiates it; as I have tried to show, this can happen all in one penal procedure. Cover's work helps us to move beyond the romantic view of the Rabbis as impossibly enlightened proto-abolitionists and allows us to take them more seriously as lawmakers vigorously seeking legitimacy within the competing *nomoi* of their day. Cover's discussions suggest that the negotiations between word and deed that we find in the rabbinic procedure of capital punishment are utterly characteristic of law, whose legitimacy is threatened when it gets either too close to or too far from violence. Moreover, Cover's conception of an "imperial" *nomos* inspires us to ask about the context of Roman imperial law, and how Roman law's brand of violence may have shaped the violence developed by rabbinic law.⁸⁴ Cover's work reveals that law's coercive potential is not incidental, but central, and that law's meaning cannot be divorced from law's violence. His struggle with the violent dimensions of modern state law can serve as a model for us to struggle also with the violence of ancient Jewish law.

84. See BERKOWITZ, EXECUTION AND INVENTION, *supra* note 2, ch. 5 (discussing rabbinic execution in the context of Roman execution).

APPENDIX

MISHNAH *SANHEDRIN* CHAPTER SIX⁸⁵

1. When the judgment has been concluded, they take him out to stone him. The stoning house was outside the court house, as it is said, "Take out the blasphemer" (Lev. 24:14). One [person] stands at the entrance of the court, and the scarf is in his hand, and one person rides the horse far enough away from him so that he can still see him. [If] one says, "I have [some point] to argue for his innocence," that person (with the scarf at the entrance to the court) waves the scarf, and the horse runs and stops him. And even if he [himself] says, "I have [some point] to argue for my own innocence," they bring him back, even four or five times, only provided that there be substance in his words.

[If] they found him innocent, they exonerated him, but if not, he goes out to be stoned. And the herald goes out before him, "Person So-and-So, the son of So-and-So, goes out to be stoned because he has committed such-and-such a transgression, and So-and-So and So-and-So are his witnesses. And anyone who knows [an argument] for his innocence, let him come and argue for him."

2. When he was about ten cubits' distance from the stoning house, they say to him: "Confess." For it is the manner of those about to be put to death to confess, for everyone who confesses has a portion in the world to come. For thus we find with Akhan, that Joshua said to him: "My son, pay honor to the Lord, the God of Israel, and make confession to Him," etc. "And Akhan answered Joshua, 'It is true, I have sinned against the Lord, the God of Israel. This is what I did,'" etc. (Josh. 7:19-20). And from where [do we know] that his confession atoned for him? As it is said, "And Joshua said: 'What calamity you have brought upon us! The Lord will bring calamity upon you this day.'" (Josh. 7:25)—"this day" you have calamity brought upon you; you do not have calamity brought upon you for the world to come.

And if he does not know to confess, they say to him: "Say 'may my death be atonement for all my sins.'" Rabbi Judah says: If he knew that he was conspired against, he says, "May my death be atonement for all my

85. This translation is based on the printed edition of the Mishnah, but I have inserted a line space where the Kaufmann manuscript divides the chapter. See *Faksimile-Ausgabe des Mischna Codex Kaufmann A50*, *supra* note 40. The words in brackets are implied in Hebrew and have been added to smooth the translation. The words in parenthesis are my own explanations.

sins except for this sin.” They said to him: If so, every person [will] say this in order to clear themselves.

3. When he was four cubits’ distance from the stoning house, they took off his clothes. The man—they cover him in his front, and the woman—in her front and in her back; the words of Rabbi Judah. And the Sages say: The man is stoned naked, but the woman is not stoned naked.

4. The stoning house was the height of two men. One of the witnesses pushes him on his hips; [if] he turns over onto his heart, he flips him over onto his hips. And if he dies thereby, he has fulfilled his obligation. But if not, the second [witness] takes the stone and sets it on his heart. If he dies thereby, he has fulfilled his obligation. But if not, his stoning is by all of Israel, as it is said, “Let the hands of the witnesses be the first against him to put him to death, and the hands of the people thereafter” (Deut. 17:7).

All those who are stoned are hanged; the words of Rabbi Eliezer. And the Sages say: Only the blasphemer and idolater are hanged. The man—they hang him his face towards the people, and the woman—her face towards the tree; the words of Rabbi Eliezer. And the Sages say: The man is hanged, but the woman is not hanged.

Rabbi Eliezer said: “But did not Shimon ben Shetah hang women in Ashqelon?” They said to him: He hanged eighty women, and one does not judge two [people] in one day.

How do they hang him? They sink the beam into the ground, and the wood comes out from it; they place his hands one on top of the other, and they hang him. Rabbi Yose says: The beam is inclined against the wall, and they hang him on it the way that the butchers do. And they loosen him immediately; and if they delay, they transgress a negative commandment regarding him, as it is said, “You must not let his corpse remain on the stake overnight, but must bury him the same day. For an impaled body is an affront to God,” etc. (Deut. 21:23). That is to say, why is this [man] hanged? Because he blessed the Name, and the name of Heaven is found to be profaned.

5. Rabbi Meir said: When a person suffers, Shekhinah, what does the tongue say? As it were, my head is heavy; my arm is heavy. If thus the Maqom (God) suffers over the blood of the wicked that is spilled, how much more so over the blood of the righteous.

And not only this but everyone that delays his dead [from burial] transgresses a negative commandment. But if one delayed it for his honor, to bring him a coffin and shrouds, one does not transgress regarding him. And they would not bury him in the graves of his fathers, but rather two gravesites were prepared for the court, one for those executed by decapitation and strangulation, and one for those executed by stoning and burning.

6. When the flesh is consumed, they gather the bones and bury them in their place. And the relatives come and ask after the welfare of the judges and the welfare of the witnesses, that is to say, that we have nothing in our hearts against you, that you judged a judgment of truth. And they would not mourn with full ceremonies, but they would mourn the day of the death, since mourning the day of the death is only in the heart.